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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/674,971

09/30/2003

Gary K. Michelson

101.0059-02000

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EXAMINER

WILLSE, DAVID H

ART UNIT

PAPER NUMBER

3738

MAIL DATE

DELIVERY MODE

06/24/2009

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/674,971	<b>Applicant(s)</b> MICHELSON, GARY K.	
	<b>Examiner</b> David H. Willse	<b>Art Unit</b> 3738	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 17 March 2009.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 29-59 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 29-59 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                     | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

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The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 29-59 are rejected under 35 U.S.C. 102(e) as being clearly anticipated by Bianchi et al., US 6,033,438. As illustrated in Figure 8, the stronger bone **S** defines a peripheral rim around the weaker bone **W**, and medial and lateral portions of the leading and trailing ends of each spacer overly this peripheral rim (column 6, lines 27-42). As seen from the implant tapering depicted in Figures 8 and 9, the trailing end of the implant is configured to generally conform to at least a portion of the natural anatomical curvature of the vertebral bodies. The cavity (column 3, line 42; column 17, lines 5-8) including a curved opening formed into a portion of adjacent vertebral bodies would have been inherent from the generally circular cylindrical form of the spacers and from the need to ensure sufficient load bearing and stability via threaded engagement into bone (column 6, lines 14-26; column 8, lines 5-12 and 48-51; etc.). Regarding claim 31 and others: column 3, lines 42-44; column 8, line 60 et seq.

### **Response to Applicant's Remarks**

The Applicant relies on the term “mid-longitudinal axis” in an attempt to define over the prior art, but such a term must be given its broadest reasonable interpretation (MPEP § 2111) and is not defined by the Applicant in a manner prescribed by MPEP § 2111.01. In Bianchi et al., a mid-longitudinal axis passes through a centroid of the longitudinal wall which borders the lateral side of chamber **530** or **530'**. Moreover, US 6,241,770 (corresponding to the grandparent of the

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instant application) does not assign any “special meaning” (MPEP § 2111.01, section IV) to the term “peripheral rim of the densely compacted bone” (e.g., amended claim 29, line 13), and Bianchi et al. illustrates in Figure 8 a peripheral rim S of densely compacted bone, as previously noted by the examiner.

The Applicant asserts that the embodiments of Figures 8 and 9 of Bianchi et al. lack “generally non-linear leading and trailing ends” (e.g., amended claim 29, line 7); the examiner disagrees, because the leading and trailing ends are tapered and threaded (Figures 8-10 of Bianchi et al.) and hence possess curved surfaces and rounded edges. Regarding the implant lengths disclosed by Bianchi et al., although the pertinent claim limitations are adequately addressed above, attention is also directed to the examiner’s discussion on page 4 in the Office action of January 23, 2009, for parent application serial no. 09/792,679.

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a). A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Dave Willse, whose telephone number is 571-272-4762 and who

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is generally available Monday, Tuesday, and Thursday. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Corrine McDermott, can be reached on 571-272-4754. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

**/David H. Willse/  
Primary Examiner  
Art Unit 3738**